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Fall 9-1-1958

## Conflict Of Laws In Insurance Coverage Of Interspousal Torts

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### Recommended Citation

*Conflict Of Laws In Insurance Coverage Of Interspousal Torts*, 15 Wash. & Lee L. Rev. 266 (1958).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol15/iss2/10>

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Whether or not this logical result is desirable is for the courts to determine. It is a possibility, however, not to be ignored. In interpreting the laws of today, courts must foresee the problems of tomorrow. To do otherwise is to pave the road for confusion, disorder, and injustice. If those who in fact have been wronged can be provided with an easy means of redress without subjecting defendants to unconscionable hardships, a desirable balance will be reached.<sup>53</sup> However, extreme measures to protect plaintiffs, such as may result from a broad interpretation of the *Nelson* decision, may well discredit the very system of justice which the courts seek to promote. It is well to remember that injustice lies at the extremity of justice.

PATRICK D. SULLIVAN

### CONFLICT OF LAWS IN INSURANCE COVERAGE OF INTERSPOUSAL TORTS

Actions between spouses involving torts to the person were not recognized at common law.<sup>1</sup> The modern view has resulted in the abrogation of the common law rule by decision or by statute in many jurisdictions. But because of the intimacy of the relationship involved, a fear of collusion between spouses has arisen when insurance is involved, particularly with respect to automobile accidents.

The New York Legislature passed a statute in 1937 permitting interspousal tort actions.<sup>2</sup> At the same time, section 167(3) was added to the New York Insurance Law, which provides that "no policy or contract shall be deemed to insure against any liability of an insured because of death of or injuries to his or her spouse or because of injury to, or destruction of property of his or her spouse unless express provi-

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some purposes though not for all. If one State may, without violation of the due process clause, extend the authority of its courts beyond its boundaries over persons and situations not sufficiently related to that State, the separate identity of States will be reduced to a mere fiction. Individual states could undertake at the expense of other States to enlarge the sphere of their authority to nationwide dimensions. It requires no flight of fancy to foresee the resulting maze of lawsuits adjudicating the interests of persons having only the faintest and most remote links with the State exercising authority. If the due process clause is not effective to restrain such extensions of local power, then the federal system is likely to be transformed into something very different from anything we have known." *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*, 239 F.2d 502, 509 (4th Cir. 1956).

<sup>53</sup>Armstrong, Comment, 22 *Tenn. L. Rev.* 252 (1952).

<sup>1</sup>41 C.J.S. 877 (1944).

<sup>2</sup>N.Y. Dom. Rel. Law § 57.

sion relating specifically thereto is included in the policy."<sup>3</sup> This New York approach appears to be unique. "These simultaneous enactments disclose a considered legislative intent to create a right of action theretofore denied, and at the same time to protect insurance carriers against loss through collusive actions between husband and wife."<sup>4</sup>

But what effect is to be given the New York Insurance Law in cases arising in a forum other than New York and in which a New York insurance policy is involved? The governing law applied in such cases could be that of the place of contracting,<sup>5</sup> the place of performance,<sup>6</sup> the place contemplated by the parties,<sup>7</sup> or the place having the most substantial connection with the transaction, using an approach called the grouping of contacts or center of gravity rule.<sup>8</sup>

The New York Court of Appeals was called upon to interpret these statutes in *New Amsterdam Cas. Co. v. Stecker*.<sup>9</sup> This case arose out of an automobile accident in Connecticut. The spouses were residents of New York and the contract of insurance was entered into there. The husband sustained injuries in the accident which occurred while his wife, the insured party, was driving. The insurance company sought

<sup>3</sup>N.Y. Ins. Law § 167(3).

<sup>4</sup>*Fuchs v. London & Lancashire Indemnity Co.*, 258 App. Div. 603, 605, 17 N.Y.S.2d 338, 340 (2d Dep't 1940), affirming 171 Misc. 908, 14 N.Y.S.2d 387 (Sup. Ct. 1939) appeal denied, 259 App. Div. 731, 19 N.Y.S.2d 311 (2d Dep't 1940).

<sup>5</sup>*Fisher v. Firemen's Fund Indemnity Co.*, 244 F.2d 194 (10th Cir. 1957); *Williams v. McFerrin*, 242 F.2d 53 (5th Cir. 1957); *Wilmington Trust Co. v. Mutual Life Ins. Co. of New York*, 177 F.2d 404 (3d Cir. 1949), cert. denied, 339 U.S. 931 (1950); *Maryland Cas. Co. v. Hearn*, 46 N.J. Super. 482, 135 A.2d 28 (1957); *Buzzone v. Hartford Acc. and Indemnity Co.*, 41 N.J. Super. 511, 125 A.2d 551 (1956), aff'd, 23 N.J. 447, 129 A.2d 561 (1956); *Globe Indemnity Co. v. Anastasio*, 5 Misc. 2d 238, 158 N.Y.S.2d 641 (Sup. Ct. 1956); *General Acc. Fire & Life Assurance Corp. v. Ganser*, 2 Misc. 2d 18, 150 N.Y.S.2d 705 (Sup. Ct. 1956); *Lamb v. Liberty Mut. Ins. Co.*, 5 Misc. 2d 236, 161 N.Y.S.2d 703 (Sup. Ct. 1941).

<sup>6</sup>*Midland Valley R.R. v. Moran Nut and Bolt Mfg. Co.*, 80 Ark. 399, 97 S.W. 679 (1906); *Goodrich, Conflict of Laws* § 110 (3d ed. 1949). Cf. *General Acc. Fire & Life Assurance Corp. v. Ganser*, 2 Misc. 2d 18, 150 N.Y.S.2d 705, 709 (Sup. Ct. 1956).

<sup>7</sup>*Pritchard v. Norton*, 106 U.S. 124 (1882); *Brown v. Gates*, 120 Wis. 349, 97 N.W. 221, 98 N.W. 205 (1903); *Goodrich, Conflict of Laws* § 110 (3d ed. 1949).

<sup>8</sup>*Mutual Life Ins. Co. of New York v. Simon*, 151 F. Supp. 408, 411 (S.D.N.Y. 1957). "The court will consider all acts . . . touching the transaction in relation to the several states involved and will apply as the law governing . . . the law of that state with which the facts are in most intimate contact." *W. H. Barber Co. v. Hughes*, 223 Ind. 570, 63 N.E.2d 417, 423 (1945); "[T]he merit of its approach is that it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation'." *Auten v. Auten*, 308 N.Y. 155, 124 N.E.2d 99, 102 (1954); *Lorenzen, Validity and Effects of Contracts in the Conflict of Laws*, 30 Yale L.J. 655, 672 (1921).

<sup>9</sup>3 N.Y.2d 1, 143 N.E.2d 357 (1957).

a declaratory judgment in New York decreeing that it was not liable to defend the action against the defendant wife in Connecticut or to pay any judgment which might be obtained against her by the husband. The Supreme Court of New York denied the plaintiff's and granted the defendants' motion for judgment on the pleadings. The Appellate Division reversed. The Court of Appeals affirmed the judgment of the Appellate Division for the plaintiff.

The defendants made two main contentions: first, that the New York Insurance Law is inapplicable since the place of performance of the insurance contract is where the accident occurs, and that Connecticut does not have any limiting statute comparable to the New York Insurance Law; second, that the simultaneous passage of the two acts in 1937 indicated that the legislature intended to protect carriers only where the accidents are within the State of New York. The latter contention is based on the fact that prior to 1937 spouses could sue each other in tort in Connecticut on account of an accident in Connecticut, and the insurance company would have been obligated to discharge the liability of an insured established in such a suit. The same action could not have been brought in New York.<sup>10</sup> There is nothing in the statute indicating an intention on the part of the legislature to alter that situation. The amendment was designed solely, the defendants argue, to protect insurance companies from the new liability in New York that had been created by the amendment to the Domestic Relations Law.

The court answered the first contention by stating that there was no issue before it as to how performance was to be accomplished, or as to the sufficiency of the performance, but only an issue of whether or not there was to be any performance at all. "Is the defendant . . . insured? Has Amsterdam agreed to indemnify her for the loss here anticipated? What was the contract the parties made? What were the right, (sic) and obligations which flowed from the document they drew? These are questions, the answers to which are governed solely by the *lex loci contractus*—New York State . . ." <sup>11</sup> To apply the law of Connecticut to ascertain the contract between the parties would give extraterritorial effect to the laws of that state. The statute "is mandated into and made a part of every policy of automobile liability insurance issued in this State."<sup>12</sup>

Nor would the court agree with the defendants' second line of

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<sup>10</sup>Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936).

<sup>11</sup>New Amsterdam Cas. Co., v. Stecker, 3 N.Y.2d 1, 143 N.E.2d 357, 359 (1957).

<sup>12</sup>Ibid.

reasoning. Until the change in its Domestic Relations Law, New York insurance carriers were not exposed to any substantial danger of actions based on collusion between spouses, for such suits could only be brought in a state that both permitted the suit and involved an accident within that state. The court cited *Mertz v. Mertz*,<sup>13</sup> decided prior to the passage of the two amendments, in which it was held that one spouse could not sue another in New York for an alleged tort committed in Connecticut, a state which permitted such an action. "The manifest purpose of subdivision 3 of section 167 was to protect carriers from collusive actions between spouses arising out of automobile accidents. Surely the Legislature recognized that the possibility of fraud and collusion is the same no matter where the accident occurs."<sup>14</sup>

The *Stecker* case presents an interesting conflict of laws problem that in recent years has appeared before the courts in increasing numbers. Three major questions are involved in nearly all cases of this type: the capacity of the spouses to sue one another, the applicable tort law, and the liability of the insurer to defend the primary tort action against the insured spouse and to pay any judgment rendered against its insured.

The general rule and the rule adopted by the *Restatement of Conflict of Laws*<sup>15</sup> reflects the tendency to decide these cases on tort principles—the law of the place of wrong determines whether a person has sustained a legal injury.<sup>16</sup> With only a few exceptions,<sup>17</sup> the cases hold that the law of the place of wrong also determines the capacity of the parties to sue one another.

There are three possibilities as to the law applicable to determine whether there is an actionable tort: the law of the forum, the law of the place of the accident, and the law of the domicile.<sup>18</sup> In the majority

<sup>13</sup>271 N.Y. 466, 3 N.E.2d 597 (1936).

<sup>14</sup>New Amsterdam Cas. Co. v. Stecker, 3 N.Y.2d 1, 143 N.E.2d 357, 360 (1957).

<sup>15</sup>§ 378 (1934).

<sup>16</sup>Rowe v. Pennsylvania Greyhound Lines, 231 F.2d 922 (2d Cir. 1956), cert. denied, 351 U.S. 984 (1956); Jones v. Kinney, 113 F. Supp. 923 (W.D. Mo. 1953); Sharp v. Johnson, 248 Minn. 518, 80 N.W.2d 650 (1957); Dell'Aria v. Bonfa, 307 S.W.2d 479 (Mo. 1957); Coster v. Coster, 289 N.Y. 438, 46 N.E.2d 509 (1943); Hudson v. Decker, 7 Utah 2d 24, 317 P.2d 594 (1957); Urban v. Chars, 1 Wis. 2d 582, 85 N.W.2d 386 (1957). The cases on this point are multitudinous.

<sup>17</sup>Kircher v. Kircher, 288 Mich. 669, 286 N.W. 120 (1939); Kyle v. Kyle, 210 Minn. 204, 297 N.W. 744 (1941); Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936); Poling v. Poling, 116 W. Va. 187, 179 S.E. 604 (1935). In these cases the forum is also the domicile of at least one of the parties. These are samples of the "public policy" cases, where the lex fori refuses to recognize the lex loci delicti approach.

<sup>18</sup>The law of the domicile is much neglected in the United States but is apparently given strong emphasis in civil law. "[I]t is commonly assumed that in certain re-

of cases, the forum will also be either the place of accident or place of domicile.

In some of the earlier cases, the action was brought in a state of domicile which permitted interspousal actions, while the place of the accident did not permit such actions.<sup>19</sup> Applying the rule that the place of accident control all elements of the case, it was held that the *lex loci delicti* applied and the plaintiff could not maintain the action.

On the other hand, where the action is brought in a forum of the domicile which does not recognize such actions, there has been a tendency to disregard the *lex loci delicti* and apply the *lex fori* which is in accord with the domestic policy of the forum.<sup>20</sup> Though later contradicted in New York by *Coster v. Coster*,<sup>21</sup> in which the Court of Appeals held that the capacity of the parties to sue was controlled by the *lex loci delicti*, a good example of this *lex fori* approach appears in *Mertz v. Mertz*.<sup>22</sup> Judge Lehman there said: "The sovereign power of each state is coterminous with its territorial limits. Its law alone determines what acts may be performed there with impunity and from what acts liability enforceable in its courts shall flow. The law of one state has in other jurisdictions such force only as is lent to it by the law of such jurisdiction. A cause of action for personal injuries is transitory. Liability follows the person and may be enforced wherever the person may be found. None the less, a cause of action arising in one state may be enforced in another state only by the use of remedies afforded by the law of the forum where enforcement is sought."<sup>23</sup> Later in the opinion

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spects the legal position of an individual should normally be determined by the law of that state with which he is deemed to be connected in a permanent way, rather than by the divergent laws of those states in which he may happen to be physically present, to act, or engage in transactions." 1 Rabel, *The Conflict of Laws: A Comparative Study* 101 (1945). "As respects provisions excluding lawsuits between husband and wife, the American rule that the law of the forum or, in the case of an action in tort, the law of the place of the wrong should be applied, is not shared by other countries . . ." *Id.* at 322. "It may be briefly noted in recalling the analogy of marital relations that in this country actions for tort between parents and child . . . are purely tort matters, while in civil law they are primarily incidents of the family law." *Id.* at 606.

"The effect of intermarriage of the parties upon tort liability has also been frequently referred to the law of the place of the tort . . . The important social purpose here has to do primarily with domestic relations and therefore the domiciliary law might well be applied, since for other purposes concerning domestic relations it is so applied." Stumberg, *Principles of Conflict of Laws* 206 (2d ed. 1951).

<sup>19</sup>*Dawson v. Dawson*, 224 Ala. 13, 138 So. 414 (1931); *Howard v. Howard*, 200 N.C. 574, 158 S.E. 101 (1931); *Buckeye v. Buckeye*, 203 Wis. 248, 234 N.W. 342 (1931).

<sup>20</sup>See note 17 *supra*.

<sup>21</sup>289 N.Y. 438, 46 N.E.2d 509 (1943).

<sup>22</sup>271 N.Y. 466, 3 N.E.2d 597 (1936).

<sup>23</sup>*Id.* at 598.

it was stated: "The law of the forum determines the jurisdiction of the courts, the capacity of parties to sue or be sued, the remedies which are available to suitors and the procedure of the courts."<sup>24</sup> Judge Lehman also seemed to be hinting to the New York Legislature to alter the common law rule forbidding interspousal actions.<sup>25</sup> The accident occurred in Connecticut, which had abolished the common law rule as to immunity, whereas the suit was brought in the forum of domicile, New York.

It is to be noted that where the forum and place of accident coincide, little or no regard is given to the law of the domicile of the parties. The cases are decided on tort principles rather than as an incident of family law. Perhaps the state of the domicile has the greater interest in the matter: either denying such suits on the basis of preserving domestic tranquillity, or permitting them on the basis that such actions will no more disturb the tranquillity than will interspousal actions concerning other rights. There appears to be no valid reason for disregarding this aspect of the conflicts problem except for the mechanical application<sup>26</sup> of a rule meant to standardize the approach in conflict cases but which has been achieved at the expense of the family law of the domicile. For example, why should a state where an accident occurs, which does not permit such suits, be allowed to project its law into the state of domicile which allows such actions, and defeat the right of an injured spouse merely because the accident occurred in the former state? The domestic law of the parties should outweigh (and the parties probably so expect) the law of the *lex loci delicti* with respect to their rights to institute suit against one another.

In July 1955, *Williamson v. Massachusetts Bonding and Ins. Co.*<sup>27</sup> was decided. This case appears to have been the first brought outside

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<sup>24</sup>Id. at 599.

<sup>25</sup>"We are told that the rule 'exists merely as a product of judicial interpretation, is vestigial in character, and embodies no tenable policy of morals or social welfare.' That is a strong indictment of the existing law, and, if true, calls for change in the law . . . [C]hange, if any, must be made by the Legislature." Id. at 598. "A disability to sue which arises solely from the marital status and which has no relation to a definition of wrong or the quality of an act from which liability would otherwise spring may perhaps be an anachronistic survival of a common-law rule. Even then the courts should not transform an anachrony into an anomaly, and a disability to sue attached by our law to the person of a wife becomes an anomaly if another state can confer upon a wife, even though residing here, capacity to sue in our courts upon a cause of action arising there." Id. at 600.

<sup>26</sup>Other than producing uniformity, about the best that can be said for the application of the *lex loci delicti* rule is its ease of application. Therein lies its almost universal appeal. See Stumberg, *Principles of Conflict of Laws* 201 (2d ed. 1951).

<sup>27</sup>142 Conn. 573, 116 A.2d 169 (1955).

New York and involving the New York insurance statute. The wife obtained a judgment against her husband as a result of a tort committed in Connecticut. Suit was then brought in Connecticut against the insurance company to satisfy the judgment. The defendant insurer demurred on the basis of the New York Insurance Law, the policy having been issued in New York. The court agreed that the construction of the contract was controlled by the law of New York. But it then stated that the lower court was "justified in presuming that the New York legislature was aware of the rule that, in an action brought in another state by one spouse to recover for injuries caused by the negligence of the other in that state, the law of the place where the injuries were received governs . . . . It is clear that the New York legislature had no intent to control a foreign factual situation over which it assumed to have no control."<sup>28</sup> One writer has suggested that the Connecticut court used the *renvoi* in arriving at its decision,<sup>29</sup> and the approach strongly supports the contention. However, the outcome appears contradictory. Conceding that the contract was to be interpreted under New York law, the Connecticut court relied on the *Coster* case as the basis for a remission, in the *renvoi* manner, to the substantive law of Connecticut, because the accident occurred there. The question involved was characterized as one sounding in tort. Since the real issue was the liability of the insurance company under a contract, the question could more properly have been characterized as sounding in contract. The court apparently overlooked the holding in *Lamb v. Liberty Mutual Ins. Co.*,<sup>30</sup> in which the named insured loaned his car to the defendant-husband, who injured his plaintiff-wife while driving in Connecticut. She sued the named insured and her husband, who was also an insured under the terms of the policy. The company refused to defend her husband. Plaintiff was awarded judgment and then sued the company on the judgment. The New York court held that "concededly the statute does not apply to an accident in Connecticut. But this suit is brought not upon an accident but upon a contract, made in New York and performable here. The statute applies to it."<sup>31</sup> If a *renvoi* was applied in the *Williamson* case, Connecticut did not make a thorough search of the New York law.

In September 1955, the trial court in the *Stecker* case<sup>32</sup> adopted the view of *Williamson*, that the insurance law was not intended to

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<sup>28</sup>Id. at 172.

<sup>29</sup>Comment, 35 B.U.L. Rev. 291, 293 (1955).

<sup>30</sup>5 Misc. 2d 236, 161 N.Y.S.2d 703 (Sup. Ct. 1941).

<sup>31</sup>Id. at 705.

<sup>32</sup>208 Misc. 858, 145 N.Y.S.2d 148 (Sup. Ct. 1955).

diminish the liability of automobile insurance carriers, and the rule in *Coster* as to the *lex loci delicti*. As for the contract, it was held that the place of performance controls, and the law of the state of Connecticut governs the performance of plaintiff's obligation to defend against the action.

In December 1955, the Supreme Court of New Hampshire decided *Priddle v. Farm Bureau Mut. Ins. Co.*,<sup>33</sup> a similar case arising under the New York statutes. The court relied upon the trial court decision in *Stecker*: "It is not for us to speculate either upon the course which the Stecker case may take in the courts of New York, or upon the views which the Court of Appeals may entertain if the issue of this case should ultimately reach that court. Applying the decided cases, we are of the opinion that the parties must be considered to have intended the coverage to extend to the claims of a spouse arising out of an accident occurring outside of New York."<sup>34</sup> New Hampshire clearly expressed its willingness to go along with the New York interpretation, and even seemed to suspect that the *Stecker* case would not stand up on appeal.

Next came *General Acc. Fire & Life Assurance Corp. v. Ganser*,<sup>35</sup> brought in the Supreme Court of New York by an insurance company for a declaration of the insurer's rights arising out of an accident in South Carolina, where the wife's suit against her husband's administrator was pending in a federal court. It was held that the right of the wife to recover in tort is determined under the laws of South Carolina. But her rights under the policy arises *ex contractu* and must ordinarily be fixed and determined by the *lex loci contractus*. The court reviewed the *Lamb*, *Stecker*, and *Williamson* cases, pointing out that neither of the latter two cases mentioned *Lamb*, which had gone unchallenged for fifteen years. "Despite the holding of the learned Supreme Court of Errors of Connecticut in the *Williamson* case, this court is of the opinion that logic compels, and the decision in *Lamb v. Liberty Mutual Insurance Co.*, . . . requires the determination that the policy in question affords no coverage in any action based upon the liability of one spouse against the other."<sup>36</sup>

The Appellate Division of the Supreme Court of New York then reversed the trial court's decision in *Stecker*.<sup>37</sup> In commenting upon *Williamson*, the court said, "Suffice it to say that this case is not an

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<sup>33</sup>100 N.H. 73, 119 A.2d 97 (1955).

<sup>34</sup>Id. at 101.

<sup>35</sup>2 Misc. 2d 18, 150 N.Y.S.2d 705 (Sup. Ct. 1956).

<sup>36</sup>Id. at 712.

<sup>37</sup>1 App. Div. 2d 629, 152 N.Y.S.2d 879 (1st Dep't 1956).

authority insofar as it attempts to fix and determine New York law."<sup>38</sup> And later, "This exclusion provision is mandated into every policy of automobile liability insurance issued in this State . . ."<sup>39</sup> This determination was affirmed by the New York Court of Appeals.

No attempt is here made to evaluate the relative merits of the conflicting views as to interspousal immunity or liability or to consider the merits of the New York statutes dealing with the subject.<sup>40</sup> But the

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<sup>38</sup>Id. at 881.

<sup>39</sup>Id. at 882.

<sup>40</sup>For an excellent discussion on interspousal immunity see Ford, *Interspousal Liability for Automobile Accidents in the Conflict of Laws: Law and Reason Versus the Restatement*, 15 Pitt. L. Rev. 397 (1954).

It is not the purpose here to consider the merits of the New York insurance statute. It appears odd, though, that policies issued in New York do not incorporate the statute into the insurance contract. The insurance carriers, for some reason, appear to be content to omit such a provision and to litigate their rights through declaratory judgment proceedings, which in the majority of cases will take place while the primary tort action is pending in another forum. The logical course to pursue, if the companies really fear collusion between spouses, would be the inclusion of a provision in the policy excluding coverage of suits between spouses.

Furthermore, the collusive element is probably exaggerated. The all-encompassing New York Insurance Law possibly keeps more valid than collusive claims out of court. There is the possibility of collusion any time insurance is involved. See, for example, the following: *General Acc. Fire & Life Assur. Corp. v. Morgan*, 33 F. Supp. 190, 192 (W.D.N.Y. 1940), was a declaratory judgment action by the insurance company as to its liability to the administrator of the wife. Both husband and wife were killed in an auto accident while the husband was driving. Held that the New York insurance statute was intended to bar actions between "spouses" and not fraudulent actions between parties other than spouses. *Travelers Indemnity Co. v. Unger*, 4 Misc. 2d 955, 158 N.Y.S.2d 892 (Sup. Ct. 1956), was likewise a declaratory judgment action by the insurance company. The company was held liable to members of the insured partnership, though not to the husband, also a member of the partnership, for injuries sustained by the wife caused by her husband's negligent driving. In *Reis v. Economy Hotels and Restaurants Purveyors Inc.*, 4 Misc. 2d 146, 155 N.Y.S.2d 713 (Sup. Ct. 1956), a wife sued the insured corporation of which her husband was president, the husband driving while in the scope of employment. In *Jacobs v. United States Fidelity and Guaranty Co.*, 2 Misc. 2d 428, 152 N.Y.S.2d 128 (Sup. Ct. 1956), the husband and his brother, insureds, operated a store where the wife was injured. The insurance company was held liable to the brother-in-law, but not to the husband. *General Acc. Fire & Life Assur. Corp. v. Katz*, 3 Misc. 2d 328, 150 N.Y.S.2d 667 (Sup. Ct. 1956), was a declaratory judgment action by the insurance company. The son, insured, allowed his father to use his car. The mother was killed and her administrator sued the son. The insurance company could disclaim as to the third party defendant father, but the son could not be deprived of coverage. *Manhattan Cas. Co. v. Cholakis*, 206 Misc. 287, 133 N.Y.S.2d 90 (Sup. Ct. 1954), aff'd, 284 App. Div. 1041, 137 N.Y.S.2d 612 (1st Dep't 1954), was also a declaratory judgment action by the insurer. The husband was killed while the son was driving. The insured wife, as executrix, sued herself and her son. Held that the policy did not cover a cause of action against the wife, but as to the son, the statute says "spouse" and the court would not read any other provision which would also bar an action against the son. In *Munsert v.*

question of the capacity of one spouse to sue the other and the question of tort are alien situations which have merged into one problem. Family law is primarily the concern of the domicile—hence the law of the domicile should control capacity. Conversely, liability is a question of negligence and should be determined by the law of the place of accident—the *lex loci delicti*. The forum should balance the factors involved and base its decision on that point which appears more significant. The center of gravity approach, applied to contracts, would bring a similar result in the realm of torts.<sup>41</sup> For example: 1. Where the forum does not permit interspousal actions, this is the major factor so far as this jurisdiction is concerned, and the case need go no further, being dismissed without prejudice. 2. Where the forum permits interspousal actions, a further query is posed. Does the state of the domi-

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Farmers Mut. Automobile Ins. Co., 229 Wis. 581, 281 N.W. 671 (1938), the father administrator, who was also the insured, sued the insurance company to recover for the death of a minor son caused by the negligence of another minor son who was driving. Since the policy excluded any obligation to the insured, he was barred from any recovery for his own personal benefit, but he was allowed to recover to the extent of one-half of the judgment awarded for the benefit of the mother.

It is the function of the court, through its rules of procedure and evidence, and by instructions to the jury, to sort the valid from the collusive claims. "The danger of fraudulent and trivial claims is no more real than that danger in litigation between other parties, and the courts and juries are as able to deal with trivial, fraudulent, and fictitious claims between spouses as well as with such claims between other litigants." *Hamilton v. Fulkerson*, 285 S.W.2d 642, 647 (Mo. 1955). Even the plaintiff's attorney has the duty to determine, if possible, prior to the institution of suit, whether or not his client's claim is valid.

It is conceded that, absent insurance, an injured spouse would probably not institute action, even though a valid claim is present. In the majority of homes there would be little purpose in incurring an additional expense. The presence of insurance, however, does not of itself make the action collusive. Rather, the collusion feared is the establishment of the claim by the false evidence. The insurance carriers can best protect themselves by defending such actions without keeping valid claims out of court. Policies specify that the company be given notice and the right to defend suits involving the insured under the contract. There is no danger, then, of an action coming to judgment without notice to the insurer. If such were the case, the company could disclaim liability for not being allowed to defend as stipulated in the contract. The financial loss is as great whether the one injured is a spouse or a stranger. Where interspousal actions are permitted, the liability of the carrier should be determined in the same manner as though the parties were strangers, with collusion an element to be considered during the course of the trial.

<sup>41</sup>See *Lauritzen v. Larsen*, 345 U.S. 571 (1953), where the United States Supreme Court used the balancing technique to determine the law applicable to an action brought under the Jones Act. Also see *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957), where the Minnesota court probably did the same thing, though it did not so expressly state. "The object of this paper is, however, not to argue the merits of the English proper law doctrine as applied to contracts, but to suggest that there is room for a similar approach in the field of torts." *Morris*, *The Proper Law of a Tort*, 64 Harv. L. Rev. 881, 883 (1951).